INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:	
Pacific Mills v. *Nichols*, 72 F. (2d) 103	4, 5
Untermyer v. *Bowers*, 79 F. (2d) 9	5
Statutes:	
Revised Statutes, Sec. 3226 as amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as further amended by Sec. 807, Revenue Act of 1936, c. 690, 49 Stat. 1648 (U. S. C., Supp. V, Title 26, Sec. 3772)	2

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 432

EINSON-FREEMAN CO., INC., PETITIONER

v.

WALTER E. CORWIN, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, AND ALMON G. RASQUIN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 68–77) is reported in 28 F. Supp. 98. The opinion of the Circuit Court of Appeals (R. 97–100) is reported in 112 F. (2d) 683.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1940 (R. 101). The petition for a writ of certiorari was filed September 14, 1940. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After its claim for refund of taxes has been rejected, may the taxpayer enlarge the time for commencement of suit to recover those taxes by filing a second claim for refund upon a ground asserted in the prior claim?

STATUTE INVOLVED

Revised Statutes, as amended by Section 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as further amended by Section 807, Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim

unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. Any consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun.

* * * * *

[U. S. C., Supp. V, Title 26, Sec. 3772.]

STATEMENT

This suit was instituted by petitioner to recover excise taxes on jig-saw puzzles which had been collected under Section 609 of the Revenue Act of 1932 imposing a manufacturers' excise tax with respect to "games". (R. 3–9.)

On January 15, 1935, the petitioner filed a claim for refund based upon two grounds: first, that jig-saw puzzles were not games; and second, if jig-saw puzzles were games, they were children's games and so specifically exempt from tax. (Ex. A, R. 57.) This claim was rejected August 13, 1935. (Ex. B, R. 58.)

On February 4, 1937, the petitioner filed a second claim for refund upon the sole ground that jig-saw puzzles were not games. (Ex. 4, R. 53.) This claim was rejected on August 4, 1937. (Ex. 6, R. 56.)

On January 10, 1939, suit was commenced (R. 2) and, after trial, the District Court overruled the respondents' plea that the suit was not timely because brought more than two years after rejection of the first claim for refund. (R. 70–77.) The Circuit Court of Appeals reversed the judgment of the District Court and held that the time for commencement of suit ran from the rejection of the first claim for refund (August 13, 1935), and since this suit was brought more than two years thereafter it was barred.

ARGUMENT

1. Petitioner's primary reason for the issuance of the writ is an asserted conflict with *Pacific Mills* v. *Nichols,* 72 F. (2d) 103 (C. C. A. 1st). In that case one of the grounds alleged in the claim for refund was that the cost of goods sold was greater than the amount stated in the return and that the market price of cotton and wool fixed by the Bureau of Internal Revenue as of December 31, 1918, was greater than the actual market price. That claim was rejected and a second claim was filed based on the contention that the taxpayer's closing inventory of wool for the year 1918 should be valued at the British Issue Prices rather than at the figures fixed by the Bureau of Internal Revenue.

The court below distinguished the *Pacific Mills* case by pointing out (R. 99) that there the claims for refund were based upon different grounds and the second claim was not a mere repetition of the first. The same distinction had previously been

recognized by the court in *Untermyer* v. *Bowers,* 79 F. (2d) 9 (C. C. A. 2d), where it was said (pp. 10–11):

> The Court of Claims held in *B. Altman & Co.* v. *U. S.,* 40 F. (2d) 781, that after rejection the taxpayer might not so extend his time by another claim, in a case where the grounds of both claims were the same, and where there was therefore no excuse for the second. In *Pacific Mills* v. *Nichols* (C. C. A.) 72 F. (2d) 103, the First Circuit added a gloss that the taxpayer might within the period of limitation file a new claim based upon new grounds; and this distinction the Court of Claims had itself recognized in *Hills* v. *U. S.,* 50 F. (2d) 302, 303. * * *

But even if it be assumed, as the petitioner contends, that the claims involved in the *Pacific Mills* case were identical, that decision is not in conflict with the decision in this case because the real basis of that decision was that the Commissioner, by considering the second claim, reopened the claim first filed and the statute began to run on the date of final rejection. *Pacific Mills* v. *Nichols, supra,* p. 107. The consideration and rejection of the second claim in this case could not effect a reopening of the original claim since Section 3226 of the Revised Statutes, as amended by Section 807, Revenue Act of 1936 c. 690, 49 Stat. 1648 (U. S. C. Supp. V, Title 26, Sec. 3772), here applicable, specifically provides—

> consideration, reconsideration, or action by the Commissioner with respect to such claim

following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun.

2. The petitioner contends that the court below ignored the findings of fact of the District Court that the two claims for refund were based upon different grounds. The claims themselves were the only evidence upon this question. (Ex. A, R. 57 and Ex. 4, R. 53.) As the ground that jig-saw puzzles were not games is plainly asserted in each claim and considered by the Commissioner in his rejection of each claim (Ex. B, R. 58 and Ex. 6, R. 56) there was no evidence to sustain the findings of the District Court and the Circuit Court of Appeals properly set them aside.

CONCLUSION

The decision of the court below is correct. There is no conflict with other decisions, and no question of general importance is presented. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

OCTOBER, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940